Nuri Asia Sdn Bhd v Fosis Corp Sdn Bhd & Anor

HIGH COURT (MELAKA) — CIVIL SUIT NO MT1–22–145 OF 2003
LOW HOP BING J
24 JANUARY 2006

Contract — Guarantees — Validity — Acting under coercion — Whether written guarantee has been tainted with coercion — Contracts Act 1950 (Act 136), ss 14, 15

Evidence — Burden of proof — Person who alleged fact had to prove it — Existence or otherwise of an oral guarantee is sharply conflicting — Determine the probability and plausibility of oral evidence — Approach to be used —

The plaintiff's claim against the first defendant as the principal debtor and the second defendant as a guarantor for the sum of RM1,182,970.20 being the price of goods sold and delivered by the plaintiff to the first defendant upon an oral guarantee allegedly given by the second defendant to the plaintiff on or about 17 October 2002 and later reduced to writing in the form of the letter dated 4 April 2003. Upon the plaintiff (SP1) failing to recover payment from the first defendant, SP1 then lodged a police report on 5 March 2003 and prepared the written guarantee for the second defendant to sign. The second defendant denied that he was a guarantor and pleaded in his defence that he was acting under coercion and was forced by the plaintiff's director and shareholder to sign the written guarantee, for which he had lodged two police reports, one on the date of the written guarantee, ie 4 April 2003 and another on 13 April 2003.

Held:

(1) The evidence adduced by the parties respectively pertaining to the existence or otherwise of an oral guarantee is sharply conflicting. The safer approach is set out by Chang Min Tat FJ (as he then was) for the Federal Court in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229. For this purpose, the police report lodged by the plaintiff's sole witness (SP1) may be used to determine the probability and plausibility of his oral evidence. The plaintiff's claim founded on the existence of an oral guarantee appears to run counter to the plaintiff's own police report which has made no mention whatsoever of any oral guarantee. Had such an oral guarantee ever existed, SP1 would most certainly have stated this crucial fact in his police report (see paras 17, 19–20).

(2) The absence of an oral guarantee is further fortified by the plaintiff's acts and deeds in issuing the notices of demand to the first defendant only while none was issued to the second defendant. Had there been truly an oral guarantee as alleged by the plaintiff, the plaintiff would have had no hesitation whatsoever

in making such demands on the second defendant. The evidence is clearly more consistent with the absence of an oral guarantee (see para 21).

(3) The written guarantee was executed by the second defendant in very unorthodox circumstances. The second defendant's police reports contain all the material particulars pertaining to the circumstances surrounding the signing of the written guarantee. These police reports lodged contemporaneously with the execution of the written guarantee must be read in the light of the conflicting evidence of the parties. They probably reflect the true position (see paras 25, 30).

(4) Therefore, the written guarantee had been tainted with coercion as defined in s 15 of the Contracts Act 1950 and so there was no free consent under s 14 of the same Act, as a result of which the written guarantee was vitiated thereby (see para 35).

(5) The execution of the written guarantee by the second defendant subsequent to the sale and delivery of the cables by the plaintiff to the first defendant was clearly not at the desire or request of the promisor and was therefore not a good consideration, as it fell squarely within s 80 illustration (c) of the Contracts Act 1950 and was therefore void (see para 40).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan pertama sebagai penghutang utama dan defendan kedua sebagai penjamin untuk jumlah RM1,182,970.20 yang merupakan harga barangan yang dijual dan dihantarkan oleh plaintif kepada defendan pertama di atas satu jaminan lisan yang kononnya diberikan oleh defendan kedua kepada plaintif lebih kurang pada 17 Oktober 2002 dan kemudiannya dirakamkan secara bertulis dalam bentuk surat yang bertarikh 4 April 2003. Setelah plaintif (SP1) gagal mendapatkan bayaran daripada defendan pertama, SP1 telah membuat satu laporan polis pada 5 Mac 2003 dan menyediakan jaminan bertulis untuk ditandatangani oleh defendan kedua. Defendan kedua menafikan bahawa beliau seorang penjamin dan memplidkan dalam pembelaannya bahawa beliau dipaksa oleh pengarah dan pemegang saham plaintif menandatangani jaminan bertulis, di mana beliau telah membuat dua laporan polis, satu pada tarikh jaminan bertulis iaitu 4 April 2003 dan satu lagi pada 13 April 2003.

Diputuskan:

(1) Keterangan yang diperoleh daripada pihak-pihak masing-masing berhubung dengan kewujudan ataupun tidak satu jaminan lisan adalah bertentangan. Pendekatan yang lebih sesuai dinyatakan oleh Chang Min Tat FJ (pada masa itu) dalam *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229. Untuk tujuan ini, repot polis yang dibuat oleh saksi tunggal plaintif (SP1) boleh digunakan untuk menentukan kebarangkalian dan munasabahnya keterangan lisannya. Tuntutan plaintif berdasarkan kewujudan satu jaminan lisan nampak seperti bertentangan dengan repot polis plaintif sendiri yang tidak menyatakan

langsung sebarang jaminan lisan. Jika jaminan lisan ini wujud, SP1 tentunya akan menyatakan fakta penting ini di dalam repot polisnya (lihat perenggan 17, 19–20).

(2) Ketidakwujudan jaminan lisan lebih dikukuhkan oleh tindakan dan perbuatan plaintif dalam mengeluarkan notis-notis tuntutan hanya kepada defendan pertama sahaja sementara tiada sebarang notis yang dikeluarkan kepada defendan kedua. Jika benar terdapat satu jaminan lisan seperti yang dinyatakan oleh plaintif, plaintif tentunya tidak akan ragu-ragu langsung dalam tuntutan mereka terhadap defendan kedua. Bukti adalah jelas lebih memihak kepada ketidakwujudan jaminan lisan (lihat perenggan 21).

(3) Jaminan bertulis ditandatangani oleh defendan kedua di dalam keadaan yang sungguh luar biasa. Laporan-laporan polis defendan kedua mengandungi kesemua butir-butir yang material berhubung dengan keadaan yang meliputi tandatangan jaminan bertulis tersebut. Laporan-laporan polis ini dilakukan pada masa yang sama dengan tandatangan jaminan bertulis dan patut dilihat dari segi bukti-bukti yang bertentangan pihak-pihak. Ia berkemungkinan menunjukkan kedudukan yang benar (lihat perenggan 25, 30).

(4) Oleh itu, jaminan bertulis telah dicemari dengan paksaan seperti yang ditafsirkan di s 15 Akta Kontrak 1950 dan dengan ini tiada persetujuan bebas di bawah s 14 Akta yang sama, dengan itu jaminan bertulis dengan ini dilemahkan (lihat perenggan 35).

(5) Perlaksanaan jaminan bertulis oleh defendan kedua selepas penjualan dan penghantaran kabel-kabel oleh plaintif kepada defendan pertama adalah jelas bukan atas keinginan atau permintaan defendan kedua dan dengan itu bukanlah satu balasan yang baik, dan ia jatuh di dalam lingkungan s 80 ilustrasi (c) Akta Kontrak 1950 dan dengan ini terbatal (lihat perenggan 40).]

Notes

For a case on validity of guarantees, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 3590.

For cases persons who alleged fact had to prove burden of proof, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 495–496.

Cases referred to

Abdul Kadir bin Mohamad v Kamarulzaman bin Mohd Zin & Anor [2000] MLJU 658 (refd)

Industrial Concrete Products Bhd v Concrete Engineering Products Bhd [2001] 2 MLJ 332 (refd)

MBF Finance Bhd v Sim Peng Bee @ Sim Bay Bee & Anor [2003] 5 MLJ 303 (refd)

Mohd Tajuddin Salleh v Mokhari bin a/l Murgis & Anor [1993] MLJU 478 (refd)

Muthukarruppa v [1914] 27 Mad LJ 249 (refd)

Sindha v Abraham [1895] 20 Bom 755 (refd)

Tenaga Nasional Berhad (Formerly Lembaga Letrik Negara (formerly Perwaja Terengganu Sdn Bhd) [1995] 4 CLJ 670 (refd)

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 (folld)

Tobarani Mohd Arsad & Anor v Chan Term Feu [1999] 3 CLJ 188 (refd)

Legislation referred to

Contracts Act 1950 ss 2(d), 14, 15, 80, illustration (c)
Evidence Act 1950 ss 101, 102
Penal Code ss 349, 350, 351, 352, 503, 506

Yau Jiok Hua (Yau Jiok Hua & Co) for the plaintiff.
Razlan Hadri Zulkifli (Gan, Ho & Razlan Hadri) for the defendant.

Low Hop Bing J:

PLAINTIFF'S CLAIM

[1] This is the plaintiff's claim against the first defendant as the principal debtor and the second defendant as a guarantor for the sum of RM1,182,970.20 being the price of goods sold and delivered by the plaintiff to the first defendant upon an oral guarantee allegedly given by the second defendant to the plaintiff on or about 17 October 2002 and later reduced to writing in the form of the letter dated 4 April 2003 (exh P3) ('the written guarantee').

[2] The second defendant denied that he was a guarantor and pleaded in his defence that he was acting under coercion and was forced by the plaintiff's director and shareholder to sign the written guarantee, for which he had lodged two police reports, one on the date of the written guarantee, ie 4 April 2003 and another on 13 April 2003 ('the two police reports').

[3] Judgment in default has been entered against the first defendant.

EVALUATION OF EVIDENCE

[4] After a full trial, I have evaluated the evidence as follows.

[5] Plaintiff's sole witness SP1, Haidi bin Rahmat, is a director of the plaintiff. The second defendant who was SPl's close friend and former colleague had on 17 October 2002 at the plaintiff's office tried to persuade him to supply cables to the first defendant. SP1 initially declined to supply but was, after a lengthy discussion, persuaded to do so, on the basis of the alleged oral guarantee by the second defendant to be 100% responsible for the payment. The first defendant had vide two purchase orders, both dated 15 October 2002, placed orders for cables amounting to RM1,230,319.71. The second defendant had subsequently contacted one Khor Hock Seng who was a director of the first defendant to collect the payment for the goods. Khor promised to obtain the funds to make payment to the plaintiff. The second defendant then advised SP1 to go to the first defendant for payment.

[6] Upon SP1 failing to recover payment from the first defendant, he lodged Ayer Keroh police report No 421/03 on 5 March 2003 and prepared the written guarantee for the second defendant to sign.

[7] Two witnesses testified for the second defendant, the first being the second defendant himself. He was working in a public listed company, Central Cables Bhd, in which SP1 was his former colleague. The second defendant had acted as a middleman and introduced Khor to the plaintiff for the sale and delivery of cables by the plaintiff to the first defendant in Taman Desa Kuala Lumpur. After the sale and delivery, apart from making some payments, the first defendant defaulted in the balance which is now the subject matter of the plaintiff's claim.

[8] The cables were delivered by the plaintiff to the first defendant between 7 and 27 November 2002.

[9] Plaintiff's letters of demand dated 12 May 2003 and 13 August 2003 were sent to the first defendant only. None was sent to the second defendant.

[10] The eyewitness SD2 gave an account of the circumstances in which the written agreement was executed by the second defendant. I shall revert to these circumstances later in my judgment.

ORAL GUARANTEE

[11] Plaintiff's learned counsel Mr Yau Jiok Hua contended that the second defendant had given the oral guarantee and had undertaken to collect the payment from the first defendant.

[12] Mr Razlan Hadri Zulkifli, second defendant's learned counsel, submitted that:

(1) The burden is on the plaintiff to prove that the second defendant had given the oral guarantee to the plaintiff, referring to ss 101 and 102 of the Evidence Act 1950; and *MBf Finance Bhd v Sim Peng Bee @ Sim Bay Bee & Anor* [2003] 5 MLJ 303 (HC);

(2) The conflict of the parties' evidence must be resolved by reference to documentary evidence, ie SPl's police report, relying on *Tindok Besar Estate Sdn. Bhd v Tinjar Co* [1979] 2 MLJ 229 (FC); *Industrial Concrete Products Bhd v Concrete Engineering Products Bhd* [2001] 2 MLJ 332 (HC);*Mohd Tajuddin Salleh v Mokhari bin a/l Murgis & Anor* [1993] MLJU 478 (HC); and *Abdul Kadir bin Mohamad v Kamarulzaman bin Mohd Zin & Anor* [2000] MLJU 658 (HC); and

(3) There was no letter of demand from the plaintiff to the second defendant

[13] In my judgment, the issue herein revolves around the existence or otherwise of an oral guarantee. The first step towards the resolution of this issue is to determine the burden of proof.

[14] Section101 of the Evidence Act 1950 provides as follows:

> 101 Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[15] As the plaintiff desires this court to give judgment as to the legal right or liability, dependent on the existence of facts which he asserts in relation to the existence of an oral guarantee, the plaintiff must prove that those facts exist, in accordance with s 101(1). Under s 101(2), the burden of proof lies on the plaintiff (see also *MBf Finance Bhd*, pp 311–312A and *Tenaga Nasional Berhad (Formerly Lembaga Letrik Negara (Formerly Perwaja Terengganu Sdn Bhd)* [1995] 4 CLJ 670 (HC)).

[16] As this is a civil case, the burden of proof may be discharged by the plaintiff on a balance of probabilities, ie that the plaintiff's version is probably true.

[17] The evidence adduced by the parties respectively pertaining to the existence or otherwise of an oral guarantee is sharply conflicting. I therefore follow the safer approach set out by Chang Min Tat FJ (as he then was) for the Federal Court in *Tindok Besar Estate Sdn Bhd*, ie to refer to and rely on the witness' acts and deeds which were contemporaneous with the event and to draw reasonable inferences from them, adding that judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and circumstances of the case, and that plausibility should never be mistaken for veracity.

[18] The above approach was also applied by James Foong J (now JCA) in *Industrial Concrete Products*, at p 349E–H.

[19] For this purpose, the police report lodged by SP1 may be used to determine the probability and plausibility of his oral evidence. The importance of a police report in providing evidence of what had actually transpired was stressed by Abdul Malik Ishak JC (now J) first in *Mohd Tajuddin bin Salleh* and then in *Abdul Kadir bin Mohamad*.

[20] In the case before me, the plaintiff's claim founded on the existence of an oral guarantee appears to run counter to the plaintiff's own police report exh P2 which has made no mention whatsoever of any oral guarantee. Had such an oral guarantee ever existed, SP1 would most certainly have stated this crucial fact in his police report.

[21] The absence of an oral guarantee is further fortified by the plaintiff's acts and deeds in issuing the notices of demand to the first defendant only while none was issued to the second defendant. Had there been truly an oral guarantee as alleged by

the plaintiff, the plaintiff would have had no hesitation whatsoever in making such demands on the second defendant. The evidence before me is clearly more consistent with the absence of an oral guarantee.

[22] Hence, I am of the view that the plaintiff has not discharged the burden of proving on a balance of probability that the second defendant has given an oral guarantee. Indeed, it is my specific finding that the second defendant has not given any oral guarantee, but has merely acted in his capacity as an introducer or a middleman.

WRITTEN GUARANTEE

[23] It was argued for the plaintiff that the written guarantee exh P3 had been voluntarily signed by the second defendant and the second defendant had falsely pleaded in his defence that he was forced to do so.

[24] The contention for the second defendant is that:

(1) the court must look at the circumstances surrounding the execution of the written guarantee, in deciding whether the second defendant was under coercion;

(2) SP1's police report had made no mention of the written guarantee;

(3) plaintiff has never issued any letter of demand against the second defendant; and

(4) there was no consideration for the written guarantee and so it is void under illustration (c) in s 80 of the Contracts Act 1950.

[25] In my judgment, it is pertinent to point out that the written guarantee was executed by the second defendant in very unorthodox circumstances. SP1 and SD1 met in a restaurant in USJ Subang Jaya Selangor. SP1 had with him five men who were Tenaga Nasional subcontractors while the second defendant went there alone. SP1 had informed the five men of the content of the written guarantee. One of the five men went to the table where SP1 and the second defendant were having their discussion.

[26] SD2 was the eyewitness. She is an insurance agent who knew both SP1 and the second defendant. On the day in question, SD2 and the second defendant were having lunch in a restaurant in USJ Subang Jaya when at about 2.00pm, the second defendant received a telephone call. The second defendant informed SD2 that the caller was SP1 who wanted to meet him. After lunch, the second defendant accompanied by SD2 drove to another restaurant in USJ where the second defendant met SP1. On arrival there, the second defendant parked his car opposite the restaurant and walked to the restaurant to meet SP1. SD2 remained in the front passenger seat of the second defendant's car.

[27] Through the mirror in front of the seat, she saw SP1 with several other men in front of the restaurant. The second defendant was sandwiched by two of the five

men there. Both SP1 and the second defendant had an altercation. SP1 sat on a chair in front of the restaurant while another man pushed the second defendant in order to sit next to SP1, while other men stood behind them. SD2 was stunned as she knew both SP1 and the second defendant had previously been good friends. SD2 then called the second defendant on his handphone but the call did not go through. The second defendant remained seated and was surrounded by the men who were with SP1.

[28] Subsequently, when the second defendant returned to his car, SD2 asked the second defendant what had happened. The second defendant told SD2 that he was intimidated, and assaulted by SP1's men and was forced to sign the written guarantee by affixing his right thumbprint. SD2 observed that the second defendant was in fear and disorientated.

[29] The second defendant then lodged the two police reports stating that he was under coercion when he signed the written guarantee.

[30] The second defendant's police reports contain all the material particulars pertaining to the incident in the restaurant and the circumstances surrounding the signing of the written guarantee. These police reports lodged contemporaneously with the execution of the written guarantee must be read in the light of the conflicting evidence of the parties (see *Tobarani Mohd Arsad & Anor v Chan Tenn Yeu* [1999] 3 CLJ 188 at p 197f–i, per Abdul Malik Ishak J). I am of the view that they probably reflect the true position.

[31] On the other hand, as in the alleged oral guarantee, it is significant to note that SPl's police report exh P3 made no mention of the written agreement whatsoever.

[32] Again, the plaintiff's failure in issuing any notice of demand against the second defendant speaks volumes against the plaintiff's claim based on the written guarantee.

[33] In my judgment, the issue of whether the written guarantee has been extracted by SPI from the second defendant as a result of coercion must be tested under the relevant portion of s 15 of the Contracts Act 1950 which merits reproduction as follows:

> 15 Coercion
>
> Coercion is the committing or threatening to commit any act forbidden by the Penal Code with the intention of causing any person to enter into an agreement.

[34] In addition to the second defendant's two police reports alluded to above, I accept the evidence of SD2. The circumstances surrounding the execution of the written guarantee clearly come within the scope of committing or threatening to

commit acts forbidden by the Penal Code viz using criminal force or occasioning assault under ss 349 to 352; or criminal intimidation under ss 503 and 506 of the Penal Code.

[35] It is therefore my specific finding that the written guarantee has been tainted with coercion as defined in s 15 and so there was no free consent under s 14 thereof, as a result of which the written guarantee was vitiated thereby.

[36] There is yet another crucial factor that militates against the plaintiff's case. It is in relation to the validity of consideration in a legally binding contract such as the written guarantee. The cables ordered by the first defendant were delivered by the plaintiff from 7 to 27 November 2002, while the alleged written guarantee was executed on 4 April 2003. Sections 2(d) and 80 illustration (c) of the Contracts Act 1950 are applicable here.

[37] There is yet another crucial factor that militates against the plaintiff's case. It is in relation to the validity of consideration in a legally binding contract such as the written guarantee. The cables ordered by the first defendant were delivered by the plaintiff from 7 to 27 November 2002, while the alleged written guarantee was executed on *4 April 2003.* Sections 2(d) and 80 illustration (c) of the Contracts Act 1950 are applicable here.

> When at the desire of the promisor, the promisee… has done… something, such act… Is called a consideration for the promise.

[38] Section 80 provides for the sufficiency of consideration as follows:

> 80. Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

[39] Section 80 is followed by several illustrations, under which para (c) is singularly significant. It reads:

> A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

[40] The execution of the written guarantee by the second defendant subsequent to the sale and delivery of the cables by the plaintiff to the first defendant is clearly not at the desire or request of the promisor and is therefore not a good consideration, as it falls squarely within illustration (c) above and is therefore void.

[41] In the context of the facts herein, the second defendant is the promisor while the promisee is the plaintiff.

[42] Section 2(d) requires the consideration to move at the desire of the second defendant as the promisor. In other words, the consideration must be at the request,

express or implied of the second defendant as promisor: *Sindha v Abraham* [1895] 20 Bom 755. (See p 56, *The Law of Guarantees in Singapore and Malaysia* by Low Kee Yang, Butterworths 1992).

[43] Sections 2(d) and 80 read together with illustration (c) refer to the common subject matter of consideration. In relation to the interpretation of s 80 and illustration (c), I am of the view that it should be read conjunctively with and ancilliary to s 2(d), thereby incorporating the requirement of 'at the desire of the promisor'. This is the approach taken in India (see *Muthukarruppa v Kathappudaya* [1914] 27 Mad LJ 249).

[44] In the circumstances, I agree with the view of the above learned author at p 59 to the effect that the 'desire' requirement in s 2(d) remains the yardstick for the valid consideration for a guarantee; and at p 65 that past consideration is permissible under s 80 only in so far as it is permissible under s 2(d), ie if it is done at the desire of the surety; otherwise it is not a good consideration. The written guarantee was obviously not executed at the desire of the promisor, ie the second defendant.

CONCLUSION

[45] For reasons stated above, I hold that the plaintiff's claim is wholly without merit and is hereby dismissed with costs.

Order accordingly.

Reported by Sally Kee